No._____

IN THE
SUPREME COURT OF THE UNITED STATES

GIOVANNI COTTO,
Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Marianne Mariano
Federal Public Defender
Martin J. Vogelbaum
Assistant Federal Public Defender
Counsel of Record
Federal Public Defender's Office
300 Pearl Street, Suite 200
Buffalo, New York 14202
Telephone: (716) 551-3341

QUESTION PRESENTED FOR REVIEW

Whether, in a prosecution under 18 U.S.C. § 1513(b)(1), the Government must prove beyond a reasonable doubt that the defendant knew the witness against whom he allegedly retaliated gave his testimony at an "official proceeding" "before a judge or court of the United States," as provided in 18 U.S.C. § 1515(a)(1)(A)?

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES

No.

GIOVANNI COTTO, Petitioner

v.

UNITED STATES OF AMERICA,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Giovanni Cotto respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Second Circuit is reported at 957 F.3d 122 (2d Cir. 2020), and attached at pages 1-17 of the appendix to this petition.

JURISDICTION

The judgment of the Second Circuit entered on April 20, 2020. (A 1).[1] This petition is filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1513(b)(1), attached at pages 18-19 of the appendix, provides, in pertinent part:

> Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for--
>
> the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding
>
> or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1515(a)(1)(A), attached at pages 20-22 of the appendix, provides, in pertinent part:

> As used in sections 1512 and 1513 of this title and in this section—

[1] The appendix will be cited as "A #."

> the term "official proceeding" means—
>
> a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury.

18 U.S.C. § 1512(g)(1), attached at pages 23-27 of the appendix, provides, in pertinent part:

> In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—
>
> that the official proceeding before a judge, court, magistrate judge, grand jury, or Government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency.

STATEMENT

Offense Background and Conduct

Quentin Leeper and a number of his relatives and associates were under federal indictment for distributing crack cocaine in Jamestown, New York. One of Leeper's criminal confederates, Quincy Turner, began cooperating with the government. Turner's bid at self-help came to a

violent end when he was gunned down.

Information soon surfaced information about the circumstances of Turner's demise. A witness identified Anthony Maldonado as the driver of the car in which Turner's killers rode. Maldonado admitted his role to the authorities and explained that Turner's end was orchestrated by Leeper associate Jose Martinez, who paid Turner's killers. Maldonado fingered Felix Vasquez as the shooter, and Carlos Canales and Diego Castro as his accomplices.

Maldonado's cooperation contributed to the indictment of Martinez, Canales, and Castro, as well as Angel "Bate" Marcial, who'd previously done time in federal prison with Martinez and served as the middleman between him and Turner's assailants. The trial of *United States v. Martinez* was conducted at the Buffalo, New York federal courthouse. Maldonado was a witness for the prosecution.

Marcial and a man named Jose Escalera had previously been incarcerated in the Erie County, New York Holding Center at the same time. The *Martinez* case afforded them an opportunity to reunite: Marcial was one of the defendants in the *Martinez* trial and Escalera was a defendant in a separate matter in a different courtroom. The

United States Marshals brought Marcial and Escalera to holding cells whose walls wouldn't have prevented them from hearing one another if they wanted to speak.

Martinez also introduced Escalera and Maldonado. They were both being held at the Cattaraugus County, New York Jail, and were transported there together at the conclusion of court proceedings. With them was new arrestee Franky Ramos. Escalera told Ramos that Maldonado was "ratting" on a "big case" in federal court. That prompted Ramos to ask Maldonado what his case was about. Maldonado told him "guns and drugs," but didn't mention his testimony in the *Martinez* case.

Giovanni Cotto was also at Cattaraugus County, living in the same row of cells where Ramos would be designated, and alongside inmates Charles Hecht, Judson Beattie, and Daniel Colon. An inmate named Esteban Ramos-Cruz was in a facing row of cells, and Maldonado was in a row of cells backing Cotto's row, separated by a wall with vents in it. Escalera's cell was on a different floor.

Ramos, Ramos-Cruz, Marcial, Escalera, and Cotto all were reputed to be connected to the Latin Kings gang. Ramos joined the

Latin Kings during his first prison stint, but left the gang in 1996. Likewise, Ramos-Cruz was an ex-member. Marcial's, Escalera's, and Cotto's Kingship was less well- established. Maldonado had no idea whether Marcial was a member of the gang. There was no information about gang affiliation in Escalera's Cattaraugus County file, and Ramos never saw him "throw" any Latin King gang "signs." Cotto once told Ramos he was a Latin King, and during a chance "very short" encounter between Cotto and Escalera, they were "portraying to be" "Latin King brothers." However, Ramos didn't know whether they really were.

Escalera exercised his royal prerogative to spread the word of Maldonado's perfidy. He told Ramos-Cruz that he wanted Cotto to know that Maldonado was snitching on a Latin King. Ramos-Cruz declined, but Beattie, who was also present, agreed to deliver Escalera's message.

Maldonado's many field trips to court were already a neon sign of cooperation with the authorities, and they'd been noticed by the jail's other denizens. Even Colon, who was intellectually limited, considered the repeated excursions suspect -- they put "something on radars." Colon considered it only "common sense" to wonder about Maldonado's whereabouts, and his suspicions were heightened when he overheard

Ramos and Cotto talking about Maldonado going to court, and Cotto ask Maldonado about his frequent leavings.

Events thus moved quickly after Escalera sent his message. Hecht beat Maldonado unconscious in the recreation yard. After the attack, Colon saw Hecht and Cotto "high fiving." Hecht later claimed he'd overheard Cotto and Beattie talking about someone who was testifying against "a higher-up Latin King" and accepted Cotto's call to punish Maldonado in exchange for "honorary" Latin King status and the protection of the gang during his New York State prison bid. Ramos similarly said that, after the attack, Cotto told him Maldonado was a "rat" and claimed responsibility for unleashing his assailant.

Hecht's handiwork broke Maldonado's jaw and left him incapable of continuing his *Martinez* testimony for several weeks. Ultimately, he returned to the stand and Martinez was convicted of a drug charge. But Martinez, Marcial, Canales, and Vasquez were acquitted of Turner's murder.

Trial and Post-Trial Motion

A federal grand jury sitting in the Western District of New York returned a single count indictment accusing Cotto, Escalera, and Hecht

of retaliating against a witness, Maldonado, in violation of 18 U.S.C. § 1513(b)(1). Cotto pled not guilty to the charge and stood trial by jury.

Cotto was not the person who used physical force to cause bodily injury to Maldonado, so the Government's theory was that he either aided and abetted the retaliation, or willfully caused it, pursuant to 18 U.S.C. § 2. At trial and in his post-trial Fed. R. Crim. P. 29(c) motion, Cotto countered by attacking the adequacy of the government's evidence on the second essential element of § 1513(b)(1) – that he intended the beating of Maldonado as retaliation for Maldonado's testimony at an "official proceeding" -- "a proceeding before a judge or court of the United States," per 18 U.S.C. § 1515(a)(1)(A). Cotto contended that the government's evidence was insufficient to prove that either he or Hecht knew Maldonado was testifying in a federal trial, and thus necessarily inadequate to prove that either of them harbored the requisite retaliatory intent.

The jury returned a guilty verdict and the District Court denied Cotto's Fed. R. Crim. P. 29(c) motion. The District Court then sentenced Cotto principally to 115 months of imprisonment with four years of supervised release to follow. Judgment entered on September 24, 2018

and Cotto filed a timely notice of appeal on October 5, 2018.

Cotto's Appeal

The United States Court of Appeals for the Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

On appeal, Cotto again pressed his argument that the Government failed to prove either he or Hecht knew Maldonado was testifying in a federal trial, and thus that the beating of Maldonado was intended as retaliation for his participation in an official federal proceeding listed at § 1515(a)(1).

The Second Circuit rejected the premise that, for Cotto to be convicted, the Government must prove that he or Hecht knew that Maldonado was testifying in *federal* court. The federal character of the official proceeding, it said, was just a jurisdictional hook; so, while it had to be proved beyond a reasonable doubt that *United States v. Martinez* was in fact a federal trial, the Government had no obligation to prove that Cotto or Hecht was aware of that fact.

Accordingly, the Second Circuit affirmed the jury's verdict and the District Court's denial of Cotto's Fed. R. Crim. P. 29(c) motion without reaching his claim of evidentiary insufficiency. (A 6-11).

REASONS FOR GRANTING THE PETITION

The Second Circuit's Opinion Misconstrues 18 U.S.C. § 1513(b)(1) and Conflicts or is in Tension with Relevant Decisions of Other Federal Courts.

The Second Circuit held that both the text of § 1513(b)(1) and its legislative history indicate that the federal character of the official proceedings at § 1515(a)(1)(A) was intended by Congress to establish jurisdiction for the witness retaliation offense, rather than to define a substantive element of which defendants must have knowledge in order to commit the crime. (A 6-11). Both of these conclusions are wrong, and both are at odds with precedents of other federal courts.

The Statutory Text

According to the Second Circuit, the dispositive textual clue that Cotto and Hecht needn't have known of the federal nature of the official proceeding at which Maldonado gave testimony is that "the text of § 1513 does not extend the section's knowledge requirement to the definition of official proceeding provided in a separate section of Title 18." (A 8). The underlying rationale – that "the jurisdictional language appears in a phrase separate from the prohibited conduct," thus

showing that knowledge of the federal character of the official proceeding was not required by Congress – rests on an unconvincing comparison of materially different statutes. (A 7) (citing and quoting *United States v. Yermian*, 468 U.S. 63, 69 (1984)).

The Second Circuit relied primarily on this Court's decisions in *United States v. Yermian*, *supra*, construing 18 U.S.C. § 1001, and *United States v. Feola*, 420 U.S. 671 (1975), construing 18 U.S.C. § 111. However, the jurisdictional clause in § 1001 precedes the "knowingly and willfully" *mens rea*, which itself precedes the other substantive elements of the offense. § 1001(a)(3); *Yermian*, 468 U.S. at 68. And § 111, examined in *Feola*, lacks both an explicit *mens rea* and a jurisdictional clause; the applicable jurisdictional provision is far afield at 18 U.S.C. § 1114.

In contrast to the statutes in *Yermian* and *Feola*, and contrary to the Second Circuit, § 1513(b)(1) contains two *mens rea* elements: 1) The defendant must "knowingly" engage in conduct that causes bodily injury; *and*, 2) He must do so with "the intent to retaliate" for the injured person's participation in an "official proceeding." § 1513(b)(1).

United States v. Allred, 942 F.3d 641, 654 (4th Cir. 2019) (§ 1513(b)(1) "contains not one, but *two* heightened mens rea requirements.") (emphasis in original). Further, "official proceeding" is a jurisdictional element within § 1513(b)(1) itself; § 1515(a)(1)(A), which the Second Circuit treated as a "separate section of Title 18," (A 8), merely deems specific federal proceedings "official proceedings" – it is not a separate jurisdictional provision located completely elsewhere in the criminal code.

Thus, a straightforward reading of the § 1513(b)(1) leads to the conclusion that a defendant must know the federal character of the proceeding in which the witness against whom he intends to retaliate participated. Typically, "with intent means purposely." M.P.C. § 1.13(12). And "purposely" means with the "conscious object to engage in conduct of that nature," and awareness of any attendant circumstances. M.P.C. § 2.02(2)(a) (cited and discussed in *United States v. Bailey*, 444 U.S. 394, 403-406 (1980)). So, under § 1513(b)(1), the defendant must knowingly engage in injurious conduct while intending that conduct as payback for the witness' participation in an official federal proceeding of which the defendant was aware.

This is the conclusion reached by the court in *United States v. Denham*, 663 F.Supp.2d 561, 564-565 (E.D. Kentucky 2009), when construing the structurally identical § 1513(b)(2):

> A natural reading of the plain language of the specific intent formulation indicates that the Government must prove knowledge of federal involvement on the part of defendants…The natural reading here is to give meaning and effect to all words that Congress penned, rather than discard some or envision that some may be more important than others…Congress did not seek to punish any retaliation for information; instead, Congress criminalized retaliation for information provided to federal officers.
>
> ….
>
> Linguistically and syntactically, the plain language supports reading the specific intent of § 1513(b)(2) to require knowledge of a federal official… "intent to retaliate" is modified by the series of phrases constituted by "for information relating to the…possible commission of a Federal offense… given by a person to a law enforcement officer." This structure means that "intent to retaliate" draws meaning from the subsequent series of phrases, in particular as limiting language.
>
> ….

> The retaliatory intent must be *for* something, and the statute says the retaliation is *for* information provided to a law enforcement officer.[2]

(Emphasis in original). *See also United States v. Bullock*, 603 Fed.Appx. 157, 159-160 (4th Cir. 2015) ("We perceive no likelihood that the instruction at issue confused the jury regarding the elements of 18 U.S.C. § 1513(b)(1)…the district court twice properly instructed the jury that to convict Bullock…it needed to find that Bullock knew the official proceeding was a federal one."); *United States v. Abner*, 35 F.3d 251, 254-255 (6th Cir. 1994) (insufficient evidence that defendant "willfully" – "voluntarily and intentionally and with the specific intent to do something the law forbids" – set fire to federal lands; fires were started

[2] Although rejecting the conclusion that the Government must have proved Cotto and Hecht knew that Maldonado was testifying in federal court, the Second Circuit simultaneously and paradoxically suggested that the jury must find that the defendant had knowledge of the federal character of the proceeding to convict. Attempting to distinguish its own opinion in *United States v. Brown*, 937 F.2d 32, 36-37 (2d Cir. 1991), the Second Circuit said that *Brown* held only that the evidence the defendant "was aware of the federal scope of the investigation" was sufficient "for the jury to find that the defendant acted with retaliatory intent." (A 14-15 at n.8). The Second Circuit did not explain why, if the defendant needn't be aware of the federal character of the investigation at all, it was necessary for the jury to hear *any* evidence from which it could reasonably infer such "federal scope" knowledge to find the "intent to retaliate" element satisfied.

on private property and it was unreasonable to infer defendant knew they would spread to federal property).

The Legislative History

The Second Circuit's take on the legislative history was likewise unpersuasive and at odds with the decisions of other federal courts. Allowing that Cotto's "strongest" point was "that for a parallel provision of the same statute, the Victim and Witness Protection Act of 1982, 18 U.S.C. § 1512…Congress added a provision expressly providing that the Government need not prove that the defendant knew the federal nature of the official proceeding," (A 9), the Second Circuit nevertheless declined to draw the inference that the omission of such a provision from § 1513 meant that Congress intended for the Government to prove the defendant's knowledge of the federal nature of the official proceeding in a prosecution under that section.

Instead, the Second Circuit determined – despite its insistence on the "well-established and sensible default rule that knowledge of purely jurisdictional elements is generally not required" – that *Congress as a whole* voted to include the "clarifying" language removing the

Government's obligation to prove knowledge of the federal character of the official proceeding in § 1512 because a *single one of its members* voiced a "mistaken belief that courts would require the Government to prove the defendant's knowledge of federal jurisdictional elements." (A 9-11).

This explanation is puzzling in light of the Second Circuit's belief that this Court's longstanding precedents should have made it apparent to Congress that knowledge of jurisdictional elements need not be proved. It is even less satisfying as an explanation of Congressional behavior: The very Congress that, according to the Second Circuit, presumably knew that the Government need not ordinarily prove knowledge of jurisdictional elements was, also on the Second Circuit's account, nonetheless convinced it needed to include "clarifying" language on the point solely because of a lone member's confusion.

This understanding of the legislative history is at odds with a more straightforward explanation advanced by the *Denham* Court: The language in § 1512 was included because that section criminalizes the obstruction of investigations that are often nascent, and whose federal

character may therefore not be apparent to the defendant, whereas § 1513 criminalizes retaliation against those who aid more advanced official proceedings, the federal character of which is more likely to be known by the defendant:

> In § 1512 prosecutions, the key information may not yet have been provided, which makes a defendant much less likely to know of the involvement of a federal officer. Accordingly, Congress preemptively added language that no anti-federal scienter need be proven…However, in § 1513 prosecutions, the information at issue has already been provided to law enforcement, and the defendant's intent is to retaliate for that completed act…Such targeted action proceeds from targeted intent, as the plain meaning of the statute prescribes. Because § 1513 operates in a different circumstance than § 1512, the plain language requirement of § 1513 produces no absurd results, instead reflecting simply the application of a Congressional lawmaking choice.

Denham, 663 F.Supp. 2d at 569-570.

Similar to the *Denham* Court, several circuits have interpreted 18 U.S.C. § 1503 and 18 U.S.C. § 1510, both statutes in the suite of federal obstruction of justice laws, to require knowledge of the federal jurisdictional elements by defendants. *United States v. Baker*, 494 F.2d 1262, 1265 (6th Cir. 1974) (§ 1503 conviction requires that defendant

know witness gave evidence in a pending federal proceeding); *United States v. Grande*, 620 F.2d 1026, 1037 (4th Cir. 1980) (§ 1510 conviction requires that the defendant know the victim is going to give information to a federal investigator); *United States v. San Martin*, 515 F.2d 317, 320 (5th Cir. 1975) (same); *United States v. Lippman*, 492 F.2d 314, 317 (6th Cir. 1976) (same); *United States v. Williams*, 470 F.2d 1339, 1343 (8th Cir. 1973) (same).

Finally, under the Second Circuit's interpretation – in which the language at § 1512(g)(1) is merely clarifying – that language becomes surplusage. If the well-established rule is that defendants need not know of jurisdictional elements, then there is no point to saying so at § 1512(g)(1) (and not at § 1513). Yet, "the canon against surplusage…is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) (cited and quoted in *Yates v. United States*, 574 U.S. 528, 543 (2015)); *see also United States v. Harris*, 498 F.3d 278, 288-289 (4th Cir. 2007) (noting that the definitions at § 1515 apply to both § 1512 and § 1513, so giving effect to § 1512(g) does not render the § 1515 definitions superfluous because knowledge of them is remains

integral to § 1513).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Marianne Mariano
Federal Public Defender

By: /s/ Martin J. Vogelbaum
Martin J. Vogelbaum
Assistant Federal Public Defender
Counsel of Record

July 16, 2020